Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

BANK ONE, TEXAS, NATIONAL ASSOCIATION, Trustee of the Red Crest Trust; LELIA BEATRICE COX HARRIS; LINDA HARRIS BEARD; MARGIE HARRIS NEWTOWN; JOHN H. MCMULLEN, JR.; and ANDY J. MCMULLEN,
Petitioners

V.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ANNETTE REGAN LOYD
Texas State Bar No. 16731100
Reynolds & Pennington, L.L.P.
2900 Bank One Tower
500 Throckmorton Street
Fort Worth, TX 76102
Telephone: (817) 332-8850
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Attorney for Petitioners

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Fort Worth, TX 76102
Telephone: (817) 332-8850
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Attorney for Petitioners

THE QUESTIONS PRESENTED FOR REVIEW

1. Was a final judgment entered in the condemnation action?

2. Did the United States District Court improperly dismiss for lack of subject matter jurisdiction, **without a hearing**, Petitioners' *Answer and Election*, as amended and supplemented, whereby Petitioners sought to appear in the condemnation action and to exercise rights of revestment granted by the Government and filed of record in the condemnation action, when remaindermen (members and predecessors of Petitioners) had **no notice** of and **were not named as parties** to the condemnation action?

3. If a final judgment was entered, does *Fed. R. Civ. P. 60(b)* grant standing to remaindermen and their successors, holding an interest in lands that are subjects of a condemnation action filed by the United States of America, to move to appear in the original condemnation action and to move to exercise rights of revestment granted by the Government and filed of record in the original

condemnation action, when the remaindermen had **no notice** of and **were not named as parties** to the condemnation action?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE FIFTH CIRCUIT COURT OF APPEALS

The United States of America, Respondent, specifically the following Departments and Bureau:

State Department of the United States of America
7226 Main State Bldg.
2201 C St. NW
Washington, D.C. 20520

Department of Justice
Honorable Janet Reno
Attorney General of the United States of America
10th St. & Constitution Avenue, NW
Washington, D.C. 20530

United States Attorney for the Southern District of Texas
3000 Federal Bldg. & U.S. Courthouse
515 Rusk St., P.O. Box 61129
Houston, TX 77208-1129

Charles Wendlandt
Assistant United States Attorney for
the Southern District of Texas
Wilson Plaza, Suite 1400
606 No. Carancahua
Corpus Christi, TX 78476

United States Department of the Interior
Bureau of Land Management
6151 Main Interior Bldg.
1849 C St. NW
Washington, D.C. 20240

Bank One, Texas, N.A., Petitioner
P. O. Box 2605
Fort Worth, TX 76113-2605

The parent company of Bank One, Texas, N.A. is:
Bank One, Ohio, N.A.
100 East Broad Street
Columbus, Ohio 43215

Beatrice Cox Harris, Petitioner
Box 571073
Houston, TX 77257-1073

Linda Harris Beard, Petitioner
1903 Cena Drive
Brenham, TX 77833

Margie Harris Newtown, Petitioner
9158 Drumcliffe
Dallas, TX 75231

John McMullen, Jr., Petitioner
1612 Gaston Avenue
Austin, TX 78703

Andy J. McMullen, Petitioner
P. O. Box 706
Hamilton, TX 76531

Attorneys of Record for the Parties to the action before the Fifth Circuit Court of Appeals:

Charles Wendland, attorney for Respondent
Assistant U.S. Attorney
Wilson Plaza, Suite 1400
606 N. Carancahua
Corpus Christi, TX 78476

Annette Regan Loyd
H. Allen Pennington, Jr., attorney for Petitioners
Reynolds & Pennington, L. L. P.
2900 Bank One Tower
500 Throckmorton Street
Fort Worth, TX 76102

Dated this 30th day of January, 1998.

Annette Regan Loyd
Attorney of Record for Petitioners,
Bank One, Texas, N.A., Trustee of the
Red Crest Trust; Lelia Beatrice Cox
Harris; Linda Harris Beard; Margie
Harris Newtown; John H. McMullen,
Jr.; and Andy J. McMullen

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V.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, BANK ONE, TEXAS, NATIONAL ASSOCIATION, Trustee of the Red Crest Trust; LELIA BEATRICE COX HARRIS; LINDA HARRIS BEARD; MARGIE HARRIS NEWTOWN; JOHN H. MCMULLEN, JR.; and ANDY J. MCMULLEN (jointly referred to herein as "Bank One Group") respectfully pray that a Writ of Certiorari issue

to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on September 17, 1997.

OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS BELOW

The September 17, 1997 opinion of the Court of Appeals, herein sought to be reviewed, is unpublished, and is reprinted in the separate *Appendix* to this Petition (at A). The November 3, 1997 Order of the Court of Appeals denying Petitioners' *Petition for Rehearing* is unpublished and is reprinted in the separate *Appendix* to this Petition (at E). The prior *Memorandum and Order* of the United States District Court for the Southern District of Texas, Laredo Division, entered December 9, 1997, is unpublished, and is reprinted in the separate *Appendix* to this Petition (at B). The prior *Order* of the United States District Court for the Southern District of Texas, Laredo Division, entered December 9, 1997, is unpublished, and is reprinted in the separate *Appendix* to this Petition (at C). The prior *Memorandum and Order* of the District Court entered in this action on January 30, 1997, is unpublished and is reprinted in the separate *Appendix* to this Petition (at D).

STATEMENT OF THE BASIS OF JURISDICTION IN THIS COURT

The Judgment of the Court of Appeals was entered September 17, 1997. On November 3, 1997, the Court of Appeals denied Petitioners' *Petition for Rehearing*. The jurisdiction of this Court is invoked pursuant to *28 U.S.C. § 1254(1)*.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED IN THE CASE, SET OUT VERBATIM WITH APPROPRIATE CITATION

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

The Fifth Amendment

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES

28 U.S.C. § 1254

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

V.T.C.A. Civil Practice & Remedies Code

§ 17.002. Suit Against Estate For Land Title

In a suit against the estate of a decedent involving the title to real property, the executor or administrator, if any, and the heirs must be made parties defendant.

V.T.A.S. Probate Code

§ 37. Passage of Title Upon Intestacy and Under a Will

When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will, and all powers of appointment granted in such will, shall vest immediately in the devisees or legatees of such estate and the donees of such powers; and all the estate of such person, not devised or bequeathed, shall vest immediately in his heirs at law; subject, however, to the payment of the debts of the testator or intestate, except such as is exempted by law; . . .

FEDERAL RULES OF CIVIL PROCEDURE

RULE 17(a) See *Appendix* at L

RULE 17(b) See *Appendix* at L

RULE 17(c) See *Appendix* at L

RULE 54

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an

express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

RULE 55

(b) Judgment. Judgment by default may be entered as follows:

. . .

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

RULE 60

(b) Mistakes, Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a

bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

RULE 71A(c)(d) & (f) See *Appendix* at L

Public Notice 131; Delegation of Authority 73 from the Department of State, signed by John Foster Dulles, Secretary of State, dated October 19, 1953, which appears on page 6806 of Volume 18, Number 211 from the *Federal Register*, dated October 28, 1953
See *Appendix* at K

TERMS OF REFERENCE

In the interest of brevity, the following terms of reference in addition to "Bank One Group", are employed:

1. "the action" refers to Civil Action No. 529, also referred to as Civil Action L-529, the proceedings in the District Court in this case;

2. "the Bank" refers to the Fort Worth National Bank of Fort Worth, Texas;

3. "the Corporation" refers to McMullen Oil & Royalty Company, Inc., a Texas Corporation;

4. "the Government" refers to the United States of America;

5. "Langille Trust" refers to the Susie McMullen Langille Testamentary Trust;

6. "Langille Will" refers to the probated Will and Codicil of Susie McMullen Langille;

7. "Remaindermen" refers to Glenn Harris, Jr.; John H. McMullen, Jr. and Andy J. McMullen, who were and are the heirs of the body of the children of Susie McMullen Langille;

8. "Rule 60(b) Motion" refers to *[Bank One Group's] First Amended Motion Pursuant to Rule 60(b)(4) and (6) of the Federal Rules Of Civil Procedure, [Bank One Group's] Brief in Support . . .*, and *[Bank One Group's First through Fifth] Supplement[s] to [Its] Amended Motion . . .* and *Brief[s] in Support Thereof*;

9. "subject parcels" refers to the lands in which Bank One Group presently claims a 1/16th mineral interest, which are the subjects of this case;

10. "Trustee" refers to Bank One, Texas, N.A., Trustee of the Red Crest Trust.

STATEMENT OF THE CASE

1. STATEMENT OF FACTS

Identification of Property in Which Bank One Group Claims an Interest

The following is a listing of the subject parcels.

No. assigned to parcel in the action	No. of acres in parcel	Location within Porciones 14,15, 16, 17 in Zapata Co., Texas
Z-27-A	225.521	all Share No.28-A
Z-30-A	286.883	Share No. 21
Z-32-A	122.94	Share No. 20
Z-36-A	10.750	Share No. 39
Z-37-A	58.206	Share No. 26
Z-54.1-A1	27.420	Share No. 23
Z-54.1-A2	69.080	Share No. 23
Z-54.2-A	144.780	Share No. 23
Z-62-A	137.917	Share No. 18A

Statement of the History, Nature and Extent of the Interests Claimed by Bank One Group

In 1926, Judgment was entered by the 49th District Court of Zapata County, Texas, partitioning Porciones 14, 15, 16 and 17 into

shares. Shortly after the partition, certain owners of shares conveyed a 1/16th mineral interest to M. J. Raymond, a Laredo attorney, apparently in payment for legal services rendered in connection with the partition action, by general warranty deeds.

By Mineral Deed dated April 15, 1927, M. J. Raymond conveyed to H. J. McMullen the undivided 1/16th mineral interests. This conveyance was also in the form of a general warranty deed.

In 1928, H. J. McMullen executed a conveyance to McMullen Oil & Royalty Company, Inc. ("the Corporation" herein). This conveyance provides that its purpose and intention is

> to entirely divest H. J. McMullen of all right or control over the oil, gas or other minerals in the property described in this instrument, save and except the right to receive the royalty oil, gas and other minerals, or the moneys payable from the sale thereof, and it is the purpose and intention of this instrument to vest in McMullen Oil & Royalty Company, Inc., the full right, in its own name to execute oil, gas and mining leases on the oil, gas or mineral interest or [sic] land now or hereafter owned by H. J. McMullen or standing in his name, in Zapata County, to such persons, firms or corporations as it may deem best and on such terms and for such bonus moneys and delay rentals as it may deem best, and that all such cash payments, bonus moneys and delay rentals shall be paid to McMullen Oil & Royalty Company, Inc., and H. J. McMullen, his heirs, representatives and assigns shall never have any interest therein nor in any way be entitled to any part

thereof.

H. J. McMullen died in 1934, leaving a will which was probated, which left his assets to Susie McMullen, his widow (later Susie McMullen Langille).

No Notice of the Condemnation Was Served on the Corporation

The Corporation was named as a defendant by the Government in the action, as an owner of the subject parcels. The Corporation was never dismissed as a Defendant. Although it was listed as being a Texas Corporation, with its office located in Fort Worth, Texas, the Corporation was never served with notice of the action.

The executive right and the right to receive bonuses and delay rentals from the subject parcels were owned by the Corporation from 1928 until the Corporation was dissolved in 1966. At that time (the dissolution), the remainder interests in what had been the Corporation's rights in the subject parcels vested directly in Remaindermen. Then, pursuant to Langille Will, so long as a child of Susie McMullen Langille survived, possession and the right to present enjoyment of the executive right and the right to

receive bonuses and delay rentals in the subject parcels were in the Langille Trust. Upon the termination of the Langille Trust, possession and the right to present enjoyment of the executive right and the right to receive bonuses and delay rentals in the subject parcels were vested in Remaindermen. *Logan v. Logan*, 156 S.W.2d 507, 512 (Tex. 1941); *Heinzman v. Coon*, 290 S.W.2d 219, 221 (Tex. 1956).

Non-joinder of, and No Notice to, Remaindermen of Susie McMullen Langille Will

Susie McMullen Langille, the widow of H. J. McMullen, left a Will dated October 20, 1938 (*Appendix* at G), and a Codicil to said Will dated November 3, 1938 (*Appendix* at H). Langille Will provided for the creation of a testamentary trust, Langille Trust, to be administered by The Fort Worth National Bank of Fort Worth, Texas. Provisions III. H and I, appearing on page 9 of the Will provide:

> H. If either of my two children shall predecease me, or at the death of either of my children, after my death, the interest of such deceased child in the Trust Estate herein created, both as to net income and as to principal, shall go to and be for the use and benefit of the survivor.

> I. At the death of the survivor of my children, one or both of them surviving me, then this Trust Estate shall terminate and the principal of the Trust Estate then remaining in the control of the Trustee, shall be delivered and paid over to the heirs of the body of my children, per stirpes and not per capita.

Upon the probate of Langille Will, Remaindermen were vested with a remainder interest in the subject parcels because Glenn Harris, Jr., a Remainderman, was alive during the lifetime of Susie McMullen Langille. He lived until the late 1980's.

Upon the death of Mrs. Paul Bowden, a/k/a Jeannie A. Hall (the last surviving child of Susie McMullen Langille) in December, 1984, Remaindermen became vested with possession and enjoyment of the subject parcels, free of trust. Remaindermen's interests were as follows: Glenn Harris, Jr., one-half (l/2); John H. McMullen, Jr., one-fourth (1/4); and Andy J. McMullen, one-fourth (1/4). Remaindermen were all of Susie McMullen Langille's grandchildren. John H. McMullen, Jr. was born in 1944. Andy J. McMullen was born in 1948. No one appeared on Remaindermen's behalf in the action prior to 1995, when Bank One Group filed a Rule 60(b) Motion in the action.

Glenn Harris, Jr.; John H. McMullen, Jr.; and Andy J.

McMullen were settlors of Red Crest Trust. In 1985, the Settlors transferred mineral and royalty interests in the subject parcels to Texas American Bank/Fort Worth, N.A., as Trustee of the newly created Red Crest Trust. In 1989, the Federal Deposit Insurance Corporation, as receiver, transferred the trust assets of Texas American Bank/Fort Worth, N.A. to Team Bank. Team Bank merged into Bank One, Texas, National Association in 1992. Accordingly, Bank One, Texas, National Association is the duly constituted Trustee of the Red Crest Trust. Therefore, Bank One Group stands in the position of Remaindermen.

Lelia Beatrice Cox Harris, Linda Harris Beard and Margie Harris Newtown are the widow and children, respectively, of Glenn Harris Jr., who died after the creation of Red Crest Trust.

Remaindermen were not named as parties in the action, received no notice of the action, nor was a guardian ad litem or attorney ad litem appointed by the Court to represent their interests in the action. They also had no notice of their right to retain their oil and gas and mineral interests under the subject parcels, as created by the Government's *Amended Petition in Condemnation*

No. 3, as supplemented by the Government's *Amended Petitions in Condemnation No[s]. 4* through *14* (specifically Paragraph 1 of *Amended Petition in Condemnation No. 12*, filed March 6, 1956) in the action. (See *Appendix* at I and J).

Such right of election had no limit on its duration and was never withdrawn by the Government.

On March 14, 1960, the Government filed a brief consisting of seventy-two (72) pages in the action, entitled *Plaintiff's Brief Covering The Taking of The Negative Easement Estates Affecting The Minerals Only, Before the Special Commission.* In this brief, the Government discussed the history of the mineral estates located within the Falcon Dam and Reservoir. Excerpts follow:

> Declaration of Taking No. 1 in Civil Action No. 529 was filed on January 3, 1950, and the fee simple title was sought to all lands lying below a "325 foot elevation traverse",. . .
>
> Amendment No. 3 was a complete amendment and amounted to a new Petition in Condemnation for all practical purposes
>
> There was a change of attitude indicated by the filing of Amendment No. 3, as reflected in these words: "In all of the other lands in Tracts A and A-2, the fee simple estate, provided, however that the owners of the oil and gas in and under said tracts may, at their

election, retain title to said oil and gas, subject to the terms of the negative easement. . . provided, however that exploration and development of oil and/or gas under said lands will be permitted by directional drilling from locations above the 325-foot elevation traverse . . .".

. . . Not only were the minerals returned in the basin of the reservoir, but the partial negative easement drilling restriction was eliminated from the top of the earthern wings of the dam at elevation 325 down to the actual top of the steel gates at the 307-foot elevation, subject only to a flowage easement from the 307 to the 314-foot elevation traverses.

The Notice, which was served on the Bank, only advised:

You are hereby notified that a complaint in condemnation and amendments thereto have heretofore been filed in the office of the Clerk of the above named Court in an action to condemn the following defined estates:

. . .

The fee simple title absolute to those parcels of land, the numbers of which have the letter "A" as a suffix, for example, Z-1-A, Z-31-A1; and portions of the following parcels: Z-30-AB, Z-34-AB through Z-37-AB, Z-40-AB, Z-52.1-AB, Z-55-AB, Z-60-AB through Z-62-AB, subject to existing easements for public utilities and public highways.

No notice was given to the Bank of the right of revestiture which had been created by *Amended Petition in Condemnation No. 3*, which had been filed almost four years prior to the issuance of the

Notice to the Bank.

Only with the filing of *Amended Petition in Condemnation No. 12*, did the right of revestiture in the Corporation, Langille Trust and Remaindermen become known. The caption of *Amended Petition in Condemnation No. 12* states "Additional Parties for all Parcels". Unfortunately, the Bank received no notice of the filing of *Amended Petition in Condemnation No. 12*, which was filed after the Bank had been served with notice and had failed to appear.

Revestitures were in fact entered regarding the oil and gas and the mineral estates for all of the subject parcels. Stipulations were entered into between the Government and individuals having an obligation to H. J. McMullen, his heirs and assigns, to warrant and defend title to the 1/16th mineral interests in the subject parcels. Specifically, the Stipulations were entered into between the Government and the grantors to M. J. Raymond of the 1/16th mineral interests in the subject parcels, or such grantors' heirs/devisees.

The Judgments upon such Stipulations found that oil and gas would be excepted from condemnation, but provided for a negative

easement in favor of the Government to control the methods of drilling or deepening of any well for the purpose of producing oil and/or gas. The negative easement basically permitted directional (slant) drilling. Many of the Judgments upon such Stipulations **completely revested the mineral estates** of portions (sub-parcels) of the subject parcels in their former owners in fee simple (such revested sub-parcels being located between the 307 and 325 feet contour elevations).

The United States Commissioner of the International Boundary and Water Commission, United States and Mexico, acting for and on behalf of the Secretary of State of the United States of America (see *Appendix* at K), amended *Declaration of Taking No. 1* in Civil Action No. 529 by filing a map entitled *Supplement-4 to Exhibit C to Declaration of Taking No. 1* ("The Map"), which was filed on November 29, 1995 in the record of this action, but not given a docket number.

The following sub-parcels, carved out of the subject parcels, appear on The Map:

TRACT 1. Those Sub-Parcels vested in the Government in fee simple, **save and except oil and gas**:

No. 27	217.181 acres
No. 30.1	144.280 acres
No. 30.2	51.313 acres
No. 32	88.56 acres
No. 37	29.776 acres
No. 54.1 [1]	183.09 acres
No. 62.1	15.698 acres
No. 62.2	7.819 acres

[1] Consists of 40.46 acres out of Parcel Z-54.l-A2 and 142.63 acres out of Parcel Z-54.2-A

TRACT 2. Those Sub-Parcels revested in the former owners, subject to Flood Easement:

No. 27.1F	1.82 acres
No. 27.2F (referred to as 27.3-F in Judgment of Revestiture)	6.52 acres
No. 30-F	56.00 acres
No. 32.1-F	4.43 acres
No. 32.2-F	25.81 acres
No. 36-F	3.00 acres
No. 37.1F	2.28 acres
No. 37.2-F	16.07 acres
No. 54.1-F	16.54 acres
No. 54.2-F [2]	4.29 acres
No. 54.3-F	16.91 acres
No. 62-F	41.98 acres

[2] Consists of 2.14 acres out of Parcel Z-54.l-A2 and 2.15 acres out of Parcel 54.2-A

TRACT 3. Those Sub-Parcels revested in former owners, subject only to existing highway and utility easements:

No. 30-R	127.79 acres
No. 32-R	289.28 acres
No. 36-R	93.98 acres
No. 37-R	224.66 acres
No. 54-R	100.93 acres
No. 62.1-R	401.34 acres
No. 62.2-R	2.52 acres

2. COURSE OF PROCEEDINGS AND DISPOSITION IN DISTRICT COURT BELOW

In December 1949, the Government filed *Petition in Condemnation* in the action. In January 1950, the Government filed *Declaration of Taking No. 1*, which covered all interests which are the subject of this *Petition for Writ of Certiorari* and other substantial interests.

On December 22, 1955, Fort Worth National Bank was served with notice of the action. At that time the Bank was serving as Trustee of the Susie McMullen Langille Testamentary Trust ("the Langille Trust" herein). The Bank never appeared in the action.

The Corporation was named as a party in the action, but it was never personally served with notice.

After the Bank was served and failed to appear, on the 6th day of March, 1956, the Government filed an *Amended Petition in Condemnation No. 12* which stated specifically that Susie McMullen Langille, who died in 1938, and the Corporation may elect to retain title to the oil and gas in the subject parcels, subject to the terms of the negative easement. Remaindermen were not mentioned in this Amended Petition nor were they given any notice of same. No one appeared upon their behalf in the action, and neither an attorney ad litem or guardian ad litem was appointed to represent their interests.

The Bank never received notice of the right of revestment.

The right of the Bank, as Trustee of the Langille Trust, to receive revestment of its interests in the subject parcels was never dismissed or disposed of in the action.

Upon learning of the Government's leasing activities with regard to the subject parcels, Bank One Group promptly filed a *Motion Pursuant to Rule 60(b)(4) and (6) of the Federal Rules of Civil Procedure* in the action on July 31, 1995. Bank One Group filed its Amended Rule 60(b) Motion on October 10, 1995, and a

Brief in support of same on October 10, 1995.

Bank One Group filed *Supplements to [its] Amended [Rule 60(b) Motion] and Brief in Support Thereof* as follows:

Supplement No.	Date of Filing
First	Nov. 17, 1995
Second	April 15, 1996
Third	July 16, 1996
Fourth	Nov. 1, 1996
Fifth	Dec. 20, 1996

Bank One Group filed its *Answer and Election* to retain title to oil and gas in the subject parcels in the action on November 17, 1995.

Bank One Group filed Supplements to its *Answer and Election* as follows:

Supplement No.	Date of Filing
First	April 15, 1996
Second	July 16, 1996

The Government filed its *Motion to Dismiss Claims of [Bank One Group] for Lack of Subject Matter Jurisdiction* on March 26, 1996. Bank One Group filed its *Response to [the Government's] Motion to Dismiss . . . for Lack of Subject Matter Jurisdiction* on April 15, 1996.

On December 7, 1996, the Court entered its *Memorandum and Order* which granted *[the Government's] Motion to Dismiss Claims of [Bank One Group] for Lack of Subject Matter Jurisdiction.*

On December 19, 1996, Bank One Group filed a *Motion Pursuant to Fed. R. Civ. P. 59(e) to Alter or Amend the Court's Memorandum and Order Granting [the Government's] Motion to Dismiss Claims of [Bank One Group] for Lack of Subject Matter Jurisdiction.*

On January 30, 1997, by *Memorandum and Order*, the District Court denied Bank One Group's Motion to Alter or Amend the Court's Order of December 7, 1996.

3. THE BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The District Court had subject matter jurisdiction pursuant to *Fed. R. Civ. P. 55(b)(2) and (c), 60(b)(4) and (6) and 71A. Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, at 18 (1984); *Catlin v. United States*, 324 U.S. 229, 241 (1945).

ARGUMENT FOR ALLOWANCE OF THE WRIT

Questions 1 and 2 Presented for Review

Summary. The Judgment of the Court of Appeals below is in conflict with decisions of United States Courts of Appeals for the Eighth Circuit and the Ninth Circuit regarding the requirement of a direction for the entry of a final judgment upon one or more but less than all of the claims upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. ***Fed. R. Civ. P. 54(b); Burkart v. United States, 210 F.2d 602, 605 (9th Cir. 1954)*****; Tyson v. State of Iowa, 283 F.2d 802, 805 (8th Cir. 1960).**

The Government's *Petition in Condemnation* and *Declaration of Taking No. 1* in the action both named 'McMullen Oil & Royalty Co., Inc. ("the Corporation"), a Texas corporation with its principal place of business at Ft. Worth, Tarrant County, Texas,' as a purported owner of all of the subject parcels. The Government likewise named "Ft. Worth National Bank, Executor and Trustee under the will of Susie McMullen Langille deceased"

as a purported owner, in the action.

The Corporation was never served with notice of the action. Although the Bank was named as a party defendant, Remaindermen, devisees under Langille Will, were not named or served. No one appeared in the action, prior to 1995, to represent the interests of the Corporation, the Bank or Remaindermen, nor was an attorney ad litem or guardian ad litem appointed to represent and protect the interests of Remaindermen.

The Government was required to give notice to the parties affected, by personal service, of the filing of the amended petitions in condemnation that created the rights of election to retain oil and gas and mineral estates in the subject parcels. *Fed. R. Civ. P. 71A(d) and (f).* Notice of the stipulation of rights of revestment, specifically provided for in the Corporation and in Susie McMullen Langille, was never given or attempted to anyone entitled to exercise those rights of election. The Government never dismissed its amended petitions in condemnation which provided for such rights of election in the Corporation and Susie McMullen Langille. **No judgment in the action contains a direction for the entry of**

a final judgment upon one or more but less than all of the claims upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. Such wording was required, commencing in 1946, following the amendment of Fed. R. Civ. P. 54(b), in order to create a final judgment upon one or more but less than all of the claims in a case. *Burkhart v. United States*, supra; *Tyson v. State of Iowa*, supra; *Garrett v. United States*, 407 F.2d 146, 151 (8th Cir. 1969) quotes *Sears, Roebuck & Co. Mackey*, 351 U.S. 427, 435, 436 (1956); 6 *Moore's Federal Practice* § 54.28(2), et seq., at pp. 54-97; *Zapata Gulf Marine Corporation v. Puerto Rico Maritime Shipping Authority*, 925 F.2d 812, 814 (5th Cir. 1991); cert. denied, 111 S.Ct. 2917; *Dibidale of Louisiana v. American Bank and Trust Co.*, 916 F.2d 300, 304 (5th Cir. 1990).

No judgment was ever entered in the action which dismissed or disposed of the Bank's right of revestiture. Therefore, no final judgment was entered in the action because awarding of other relief remained to be resolved. *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976).

The *Order Closing Civil Action*, filed August 10, 1970, was expressly made "subject, however, to the power of the Court to make such future Orders, if any, as may be necessary." (*Appendix* at F)

Therefore, no final judgment was entered in the action; and Petitioners were entitled to file their *Answer* in the action and to file their *Election* in the action to retain, or be revested with, their oil and gas interests and mineral interests in the subject parcels.

Question 3 Presented for Review

Summary. The judgment of the Court of Appeals below is in conflict with a decision of the United States Court of Appeals for the Second Circuit. In *Dunlop v. Pan American World Airways, Inc.*, 672 F.2d 1044, 1051 (2d Cir. 1982), that Court held that persons such as the Petitioners in this case, who are sufficiently connected and identified with the original proceedings, are entitled to standing to attack those proceedings utilizing a proceeding under *Fed. R. Civ. P. 60(b)*.

Remaindermen were vested in the title to the subject parcels upon the probate of Langille Will in 1938. *McGill v. Johnson*, 799

S.W.2d 673, 675, 677 (Tex. 1990); *Chadwick v. Bristow*, 146 Tex. 481, 208 S.W.2d 888, 891 (1948); *Bufford v. Holliman*, 10 Tex. 560, 575 (1853); *V.A.T.S. Probate Code, § 37*; *Rust v. Rust*, 211 S.W.2d 262, 267 (Tex.Civ.App.-Austin 1948), aff'd 147 Tex. 181, 214 S.W.2d 462 (Tex. 1948). Lewis M. Simes and Allan F. Smith, *The Law of Future Interests*, Second Edition (1956) Vol. 2, p. 126 § 658 states:

> Whenever there is a preceding estate for life or for years or a preceding trust to pay the income to someone other than the members of the ultimate class of beneficiaries, that fact could be used to justify a holding that the ultimate gift is vested.

A life estate with power of sale is still only a life estate. An unexercised power of sale leaves both the life and remainder estates unaffected. *Calvert v. Thompson*, 339 S.W.2d 685 (Tex.Civ.App.-Austin 1960, writ ref'd); *Rekdahl v. Long*, 417 S.W.2d 387, 392 (Tex. 1967).

Fed. R. Civ. P. 71A(f) required that Remaindermen be given notice of the filing of the action and of the *Amended Petitions in Condemnation*, which provided for <u>their</u> right of election to retain the subject parcels.

Two of the Remaindermen, John H. McMullen, Jr. and Andy J. McMullen, who were vested in the remainder interest in the subject parcels, were small children when the *Petition in Condemnation* was filed. Neither of these Remaindermen were named as parties in the action, neither received notice, no one appeared on their behalf, nor was an attorney ad litem or guardian ad litem appointed to represent their interest before the Court.

Fed. R. Civ. P. 17(c) provided in part:

> The Court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Fed. R. Civ. P. 55(b)(2) states

> no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative **who has appeared therein**. (emphasis supplied)

Fed. R. Civ. P. 55(c) provides as follows:

> For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, **may likewise set it aside in accordance with Rule 60(b). (emphasis supplied)**

Fed. R. Civ. P. 71A(c) provides, in part:

> Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned.

Fed. R. Civ. P. 71A(d)(1) provides, in part "Additional notices directed to defendants subsequently added shall be so delivered."

Remaindermen were so identified as a class in the Langille Will, with which the Government was obviously familiar.

Fed. R. Civ. P. 17(a) provides that the trustee of an express trust may sue in the name of the Trustee, without joining the party for whose benefit the action is brought.

However, *Fed. R. Civ. P. 17(b)* provides that capacity to be sued shall be determined by the law of the state of the individual's domicile or in which the district court is held. All Remaindermen were domiciled in the State of Texas.

At the time of the commencement of the action, *Texas*

Revised Civil Statute Ann. Art. 1982, entitled *For Lands Against Decedents*, provided:

> In every suit against the estate of a decedent involving the title to real estate, the executor or administrator, if any, and the heirs shall be made parties defendant. *[Acts 1925*, S.B. 84]

This same language is now *V.T.C.A. Civil Practice & Remedies Code § 17.002*. This principal has been a part of the statutory law of Texas since *Acts 1870*, page 173.

In this statute, the term "heirs", by judicial construction, has been determined to include devisees. *Grohn v. Marquardt*, 487 S.W.2d 214, 217 (Tex. Civ.App.-San Antonio 1972, writ ref'd n.r.e.).

The failure to comply with *Article 1982* in the action, which named Susie McMullen Langille as a party, subjected the action to subsequent attack by Remaindermen. *Lowman v. Falsetti*, 335 F.2d 632, 638 (5th Cir. 1964); certiorari denied, 85 S.Ct. 659, 379 U.S. 966, 13 L.Ed.2d 560; *Jones v. Gibbs*, 133 Tex. 645, 130 S.W.2d 274, 275 (1939); *Allen v. Matthews*, 210 S.W.2d 849, 851 (Tex.Civ.App.-Austin 1948, writ ref'd n.r.e.), finding judgment void; *East v. Dugan*, 79 Tex. 329, 15 S.W. 273,275 (1891).

All proceedings taken in the action, which relate to the interests of the Corporation and of Remaindermen and which relate to the valuation of their interests in the subject parcels, are void as being violative of their rights to due process and to equal protection, provided for under the *Fifth Amendment to The United States Constitution.*

CONCLUSION

WHEREFORE, Petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

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